IN THE

Supreme Court of the United States

October Term, 1978

No. 78-787

KEITH A. DeJAYNES, DIANE M. DeJAYNES, AND RAYMOND E. BURGER, Wage Earner Trustee, *Petitioners,*

v.

GENERAL FINANCE CORPORATION OF ILLINOIS, A Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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January 3, 1979

BEACON PRINTING—293-7160—Washington, D.C. 20036

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

General Finance Corporation of Illinois ("General"), Respondent, respectfully submits this brief in opposition to Petitioners' Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on August 16, 1978 affirming the judgment of the United States District Court for the Southern District of Illinois, entered on December 7, 1977.

I. OPINIONS OF THE COURTS BELOW

Respondent accepts the statement of the lower court opinions as set out by Petitioners.

II. JURISDICTIONAL STATEMENT

Respondent accepts the statement of jurisdiction offered by Petitioners.

III. STATUTES AND REGULATIONS INVOLVED

Respondent accepts the statement of statutes and regulations involved in the above captioned cause as set out by Petitioners.

IV. QUESTION PRESENTED FOR REVIEW

Respondent respectfully suggests that neither the Truth in Lending Act (15 U.S.C. §§1601, et seq.) nor Regulation Z (12 CFR Part 226) use the term "closed-end" in describing a type of consumer credit. However, Respondent assumes that Petitioners, by referring to a "closed-end" transaction in stating the question presented for review, were referring to a consumer loan "not under open end credit plans," the terminology used in the statute and regulation, and on the basis of that assumption accepts the sole question presented for review.

V. STATEMENT OF THE CASE

For reasons set out in more detail in its argument which follows, Respondent suggests that the penultimate paragraph in Petitioners' statement of the case is inaccurate and that the United States Court of Appeals for the Seventh Circuit did, in fact, find that General had violated the Truth in Lending Act. That court also found, however, as Petitioners stated in the paragraph preceding the penultimate paragraph, that General was not liable for civil penalties under the provisions of 15 U.S.C. §1640(f), because its disclosures were made in good faith

conformity with regulations of the Board of Governors of the Federal Reserve System.

Other than this one misconstruction of the opinion of the Seventh Circuit Court of Appeals, Respondent accepts the statement of the case offered by Petitioners.

VI. ARGUMENT

1. No Conflict Between Circuits

Respondent respectfully submits that there is no conflict between the decision of the United States Court of Appeals for the Seventh Circuit in *DeJaynes v. General Finance Corp. of Illinois*, #78-1067, ____ F.2d ____ (7th Cir. August 16, 1978) and the decision of the United States Court of Appeals for the Fifth Circuit in *Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), rehearing denied 552 F.2d 1142 (5th Cir. 1977), cert. denied 434 U.S. 891 (1977). In the *DeJaynes* opinion, the Seventh Circuit held specifically that ". . . failure to disclose the actual proceeds of the loan violates §1639(a)(1) of the [Truth in Lending Act]" (Petitioners' Appendix, p. A18).

In the original *Pollock* decision, the Fifth Circuit held that ". . . the creditor's failure to disclose [the amount of cash given to the debtor or given on the debtor's behalf] violated §1639(a)(1)" (535 F.2d at 298-299) and in its per curiam opinion denying the Petition for Rehearing reaffirmed that holding, saying that the Truth in Lending Act ". . . requires that a creditor make a labeled disclosure of actual loan proceeds in accordance with §1639(a)" (552 F.2d at 1144).

Thus, *both* the Fifth and the Seventh Circuits are squarely in agreement that creditors are required to disclose the net loan proceeds (an amount to which

Petitioners colloquially refer as "cash in fist") and that failure to do so was a violation of 15 U.S.C. §1639(a)(1). In fact, the Seventh Circuit in *DeJaynes* acknowledged the agreement of the two circuits, saying that "[t]his conclusion is also reached in *Pollock*" (Petitioners' Appendix, p. A18, n. 4).

The Seventh Circuit went on to hold in *DeJaynes* that Regulation Z, 12 CFR §226.8(d)(1), promulgated by the Board of Governors of the Federal Reserve System to implement the Truth in Lending Act did not require itemization of net loan proceeds. Since that paragraph of the regulation had been issued effective July 1, 1969, the effective date of the Truth in Lending Act, and had never been amended, the court found that Respondent's disclosures which conformed to the requirements of that paragraph when made on November 19, 1976, were made in good faith conformity with it and that no civil penalties were recoverable. The Fifth Circuit never reached the issue of civil liability for failure to disclose the net proceeds of the loan, because in the *Pollock* decision the court found other violations which justified the imposition of civil penalties. Since the Truth in Lending Act does not provide multiple recoveries for multiple violations, the Fifth Circuit said that it was "not necessary" (552 F.2d at 1144) that the court decide the issue of civil penalties for violations of the Truth in Lending Act which did not constitute violations of Regulation Z.

Petitioners also cite the opinion of the United States Court of Appeals for the Fifth Circuit in *Liner v. Aetna Finance Co.*, 555 F.2d 1241 (5th Cir. 1977) as justification for a finding of conflict between the Fifth and Seventh Circuits. However, in *Liner* the court simply cited the *Pollock* decision saying that defendant, Aetna, had violated the Truth in Lending Act because ". . . it failed to disclose the principal amount of the loan" (at 1242), a

violation which the Seventh Circuit also found in *DeJaynes*.

Thus, in fact, there is no conflict between the Fifth and Seventh Circuits on the issue of disclosures required by 15 U.S.C. §1639(a)(1). Both require disclosure of the net loan proceeds paid to the borrower ("net cash in fist"). Similarly, there is no conflict on immunity from liability for compliance with Regulation Z. The Seventh Circuit ruled squarely that Respondent was not liable for civil penalties because it had complied with Regulation Z. The Fifth Circuit in *Pollock* said that a "perhaps more natural reading of §226.8(d)(1)" of Regulation Z would not require disclosure of net loan proceeds (552 F.2d at 1144), but that it need not decide the issue of civil penalties for that violation, because such penalties were due and payable for other violations. Thus, in fact, the Fifth Circuit in *Pollock* did not decide the issue of immunity from liability for compliance with a provision of Regulation Z which imposed requirements different from those found by the court to be imposed by the Truth in Lending Act. It did, however, address that issue in *Jones v. Community Loan and Investment Corp.*, 544 F.2d 1228 (5th Cir. 1976), cert. denied 431 U.S. 934 (1977), and held that where a creditor "in good faith conform[ed] its practice to that contemplated" under an Official Board Interpretation of Regulation Z, that creditor would not be liable for civil penalties (at 1232). Hence, there is no conflict between the circuits.

The case at bar is clearly distinguishable from others in which this honorable court has granted certiorari on the basis of conflict between circuits. In *Bingler v. Johnson*, 394 U.S. 741 (1969), the Third Circuit invalidated a Treasury Department regulation after the Fifth Circuit had specifically sustained that same regulation, and in *U.S. v. O'Malley*, 383 U.S. 627 (1966), the Seventh Circuit specifically noted its disagreement with the First Circuit

on the same issue. In both cases this honorable court granted certiorari, because a genuine conflict existed between the decisions of different circuits on the same matter. It is submitted that no such conflict exists in the case at bar and, for that reason, certiorari should be denied.

2. Good Faith Conformity with Regulation Z

Petitioners allege that on November 19, 1976, General was on notice that its disclosure form violated the Truth in Lending Act and Regulation Z, at least in the Fifth Circuit, because the first *Pollock* decision was decided on July 16, 1976. However, a motion for rehearing was pending in the *Pollock* case when disclosures were made to Petitioners on November 19, 1976. Moreover, a close reading of the original *Pollock* decision will show that the Fifth Circuit had not then held that General's disclosure form violated Regulation Z. To the contrary, in the first *Pollock* opinion, the Fifth Circuit said that the interpretation of §226.8(d)(1) of Regulation Z in *Mullinax v. Aetna Finance Co.*, CA 19124, July 25, 1975, N.D. Ga. (5 Commerce Clearing House, *Consumer Credit Guide* paragraph 98,354), holding that the net proceeds of the loan need not be disclosed, was "more consonant with the literal language of the regulation than is the interpretation made by the district judge in this case" (535 F.2d at 298). Even in denying rehearing, the Fifth Circuit said a "more natural reading of §226.8(d)(1)" would not require disclosure of the net loan proceeds (552 F.2d at 1144).

Thus, the Fifth Circuit Court of Appeals never directly ruled that failure to disclose the net proceeds of the loan was a violation of Regulation Z. Moreover, neither the original Fifth Circuit decision in *Pollock* nor the per curiam opinion in which rehearing was denied specifically held the relevant provision in Regulation Z to be

"invalid" as contemplated under 15 U.S.C. §1640(f).

Similarly, in the *DeJaynes* opinion below, the Seventh Circuit refused to rule on the issue of whether *continued* adherence to the Board's regulation after its opinion would constitute "good faith" conformity with the Board's regulations and interpretations (Petitioners' Appendix, p. A19, n. 7). Sufficient for its decision in this case, however, was its finding that General had conformed its disclosures in good faith with the Board's regulation *when it made the disclosures* to Petitioners on November 19, 1976.

VII. CONCLUSION

The decision of the Seventh Circuit Court of Appeals in *DeJaynes v. General Finance Corp. of Illinois, supra*, does not conflict with the decision of the Fifth Circuit Court of Appeals in *Pollock v. General Finance Corp., supra*. Both opinions hold that creditors are required by 15 U.S.C. §1639 (a)(1) to disclose the net proceeds of a loan. Since the decision of the Seventh Circuit is not in conflict with the decision of the Fifth Circuit on the same matter, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January 3, 1979